

Open Letter to the President of the European Commission regarding Poland's "Muzzle Law"

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Dear President von der Leyen,

As experts specialising in the rule of law, [we wrote to you on 11 December](#) to urge you to apply for interim measures to put an end to [the persecution of Polish judges and prosecutors](#) both by Polish authorities and by the two (unlawful) bodies they *de facto* control, the so-called Disciplinary Chamber and the new National Council of the Judiciary. We were gratified that you acted at that time.

But now there are new and even more pressing dangers to the integrity of the European Union presented by the Polish situation, and we urge you to take further action.

The Polish Government has enacted a "[muzzle law](#)" that bars judges from ensuring observance of the right to a fair trial and from guaranteeing rights deriving from the EU Treaties, including effective judicial protection. The law also prevents judges from controlling the validity of judicial appointments and from criticizing authorities, at the risk of being sent for disciplinary action to the very chamber of the Supreme Court which has *already* been found to constitute an unlawful body by the Supreme Court itself following a ruling from the European Court of Justice.

In response to this "muzzle law", which itself must be understood as the Polish government openly refusing to obey [the case law of the ECJ](#), the German [District Court of Appeals in Karlsruhe](#) has now refused to extradite a person sought by Polish authorities because of [its assessment](#) that Polish courts can no longer act independently given that Polish judges can now be subject at any point to arbitrary disciplinary proceedings and sanctions. This follows on the heels of Norwegian government support for the decision of its national Board of Court Administration [to withdraw](#) from planned cooperation with the Polish judiciary for the same reason.

The European Union is an integrated matrix of laws and interrelated systems, with frontline enforcement done by national courts. If the other member states can no longer rely on the independence of national courts in a particular country, mutual trust must be suspended as mutual trust is and cannot be "[blind trust](#)". The decisions by the German judiciary and the Norwegian Court Administration are a sign that the EU's legal system is already unravelling, and if judicial cooperation can no longer be assured, a major pillar that holds up the EU will soon collapse.

We commend the Commission for following [our December letter](#) with action on 14 January 2020 asking the European Court of Justice to suspend the functioning of the Disciplinary Chamber. But the action came late. Had interim measures been requested last October when the Commission finally announced its decision to refer Poland to the ECJ regarding its extraordinary and scandalous new disciplinary regime for judges, it might have prevented the damage that we now see.

Alarming but not surprisingly, the situation has continued to deteriorate further with irreparable damage now being done following the entry into force of the “muzzle law” on 14 February 2020. We urge the Commission to learn from these events. Waiting to bring infringement actions and to fail to simultaneously seek interim measures when the rule of law in a Member State is so obviously and blatantly deteriorating on an industrial scale only means that the Commission faces a far more serious and intractable problem to deal with later. The problem does not disappear by ignoring it.

This is an urgent moment for action. The Commission must quickly bring an expedited infringement action against this “muzzle law” and must at the same time consider requesting additional interim measures to prevent the “muzzle law” from being enforced by connecting these measures to the already pending infringement action with respect to Poland’s new disciplinary regime for judges. We also ask the Commission to seek to get out ahead of Polish authorities’ [obvious attempts to destroy the independence of the Supreme Court](#) which, on current trajectory, will have been crushed by early May due to the rigging of the rules on the basis of which the next First President of Poland’s Supreme Court will be selected when the term of the current incumbent expires.

Furthermore, the time has come for two infringement actions directly targeting the [Constitutional Tribunal](#), which was unlawfully captured in December 2016 and is now being increasingly used to undermine the application of EU law in Poland, and also targeting the new National Council of the Judiciary, which was established on the back of an evident violation of the Polish Constitution and whose active complicity in destroying judicial independence has been established beyond any reasonable doubt by [the European Network for Councils of the Judiciary](#) and [Poland’s Supreme Court](#).

As Věra Jourová and Didier Reynders themselves have both correctly pointed out, we are not dealing with “judicial reforms” but are facing “[a case of carpet bombing](#)” which aims to [destroy the Polish judiciary by creating a chilling effect](#) on Polish judges, that is, to scare them into submission by threatening them with politically tilted disciplinary action. Given the dangers involved, the Commission’s failure to promptly bring an infringement action against the “muzzle law” is irresponsible if not unforgivable in a situation where multiple judges have already been and continue to be repeatedly [harassed](#), [vilified](#), [sanctioned](#) and threatened with [dismissals](#), [jail time](#) and even [death](#) for seeking to uphold the rule of law.

We are alarmed that the Commission has yet to act.

Adding to our growing sense of alarm, we were disheartened to read that you have yet to find the time to meet with the [Presidents of the European Network of Councils](#)

[for the Judiciary, the Network of Presidents of the Supreme Courts of the EU and the European Judges Association](#) to discuss the worsening rule of law crisis in Poland. To make a bad situation worse, [media reports](#) are suggesting that Commission action against the “muzzle law” may have been purposefully delayed so as to be used [as a bargaining chip](#) to ease ongoing negotiations regarding the EU’s future Multiannual Financial Framework and to generate support for the Commission’s climate change legislative proposal. Adding insult to injury, it was recently suggested the Commission may not even discuss any eventual infringement action against Poland [for several more weeks](#).

The Commission over which you preside has still a chance to avoid the mistakes made by the Barroso and Juncker Commissions, so let us repeat the key lesson of the past ten years: When it comes to the deliberate and systemic dismantling of checks and balances in a Member State’s constitutional order, [time is absolutely of the essence](#). Autocrats always move in quickly to change the facts on the ground so as to present the EU with *faits accomplis* such as the unlawful appointment of individuals masquerading as judges and establishment of new bodies masquerading as courts. Unless the Commission is prepared to seek the removal of sitting “judges,” require the rehiring of suspended and fired formerly independent judges and demand the dismantling of existing “judicial” institutions, it must act before these changes become entrenched and before the Member State has the chance to complete its thorough destruction of the rule of law.

Following the belated but positive decision of your Commission in finally applying for [interim measures](#) in respect of the “Disciplinary Chamber”, we had assumed the lesson has been learned that it is important to stop unlawful changes before they occur. It would seem we were wrong. We therefore urge you to promptly initiate an expedited infringement action whose scope ought to be as wide as possible so as to also prevent the forthcoming planned capture of both Poland’s Supreme Court and Supreme Administrative Court, for instance, by [targeting the new rules which have essentially rigged the election of the next President of the Supreme Court](#).

The current procrastination is akin to dereliction of duty.

We are indeed talking about the first EU Member State to be simultaneously subject to both the EU’s exceptional monitoring process following the Commission’s activation of the [Article 7 procedure](#) and to the Council of Europe’s Parliamentary Assembly’s [special monitoring procedure](#). Both were launched due to the relentless destruction of judicial independence we have seen since the end of 2015. The process of judicial destruction has been going on for more than four years now and yet the Commission appears not to have fully grasped how close Poland is to politically capturing its entire judiciary and ending the rule of law in a Member State of the EU. It is similarly difficult to understand the ongoing delay to bring an infringement action against the “muzzle law” considering the already existing comprehensive legal assessments of this law, whose only parallels can be found in authoritarian states. One may for instance refer to the legal opinions produced by [Polish Commissioner for Human Rights](#), the [OSCE-ODIHR](#) or the [Venice Commission](#).

The Commission under your Presidency must develop a sense of urgency in this broader and unprecedented context in which, [according to the Commission itself](#), the end result of the changes pushed by Poland's ruling party "[is that the executive and legislative powers now can interfere throughout the entire structure and output of the justice system](#)."

This is not merely a clear and present danger as far as the Polish legal order is concerned but represents an existential threat to the functioning of the EU's interconnected legal system as a whole. To borrow an analogy from computer programming, the rule of law may be considered the EU's legal order's "[operating system](#)". What is happening in Poland and also in Hungary constitutes a system threat which will sooner or later corrupt and cause the failure of the EU's entire system network.

If the Commission does not act, then Member States (and other) judiciaries will have to act to defend themselves by withdrawing judicial cooperation with the Polish judiciary and ultimately, failing to recognise and enforce the decisions of Polish courts. To prevent further unravelling of the EU's core legal system, it is imperative for the Commission to act without delay.

Yours faithfully,

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